

# Reconceiving Autonomy: Sources, Thoughts and Possibilities

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## I. FEMINISM AND THE TENSIONS OF AUTONOMY

### A. *Feminist Guidance*

Feminism requires a new conception of autonomy. The prevailing conception stands at the core of liberal theory and carries with it the individualism characteristic of liberalism. Such a conception cannot meet the aspirations of feminist theory and is inconsistent with its methodology.<sup>1</sup> The basic value of autonomy is, however, central to feminism. Feminist theory must retain the value, while rejecting its liberal incarnation.

Feminism is not, of course, alone in its rejection of liberal individualism. The individualistic premises of liberal theory (and their inadequacies) have become an important subject of debate in contemporary political and legal theory.<sup>2</sup> Feminism offers us a particularly promising avenue for advancing this debate, not because it provides a fully articulated alterna-

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1. Among the many discussions of feminist theory and methodology are: Alison Jagger, *FEMINIST POLITICS AND HUMAN NATURE* (Totowa, N.J.: Rowman & Allanheld, 1983); Lorraine Code, Sheila Mullett, and Christine Overall, eds., *FEMINIST PERSPECTIVES: PHILOSOPHICAL ESSAYS ON METHOD AND MORALS* (Toronto: University of Toronto Press, 1988); Sandra Harding, ed., *FEMINISM AND METHODOLOGY: SOCIAL SCIENCE ISSUES* (Bloomington: Indiana University Press, 1987); Carol Gilligan, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (Cambridge: Harvard University Press, 1982); Tronto, *Beyond Gender Difference to a Theory of Care*, 12 *SIGNS* 644 (1987) (applying Gilligan's work to political theory); MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 *SIGNS* 635 (1983); Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 *YALE L.J.* 1373 (1986).

2. Among the best known critics of liberal individualism are Alasdair MacIntyre, *AFTER VIRTUE: A STUDY IN MORAL THEORY* (Notre Dame, Ind.: University of Notre Dame Press, 1981); Michael J. Sandel, *LIBERALISM AND THE LIMITS OF JUSTICE* (Cambridge: Cambridge University Press, 1982); Charles Taylor, *PHILOSOPHY AND THE HUMAN SCIENCES* (Cambridge: Cambridge University Press, 1985), particularly Ch. 7, "Atomism." Michael Sandel has edited an excellent collection of essays on this debate entitled *LIBERALISM AND ITS CRITICS* (New York: New York University Press, 1984).

tive to liberal theory, but because feminist concerns so effectively capture the problems such an alternative must address.

Feminism appears equivocal in its stance toward liberalism because it simultaneously demands a respect for women's individual selfhood and rejects the language and assumptions of individual rights that have been our culture's primary means of expressing and enforcing respect for selfhood. This apparent equivocation is not the result of superficiality or indecision. On the contrary, it reflects the difficulties inherent in building a theory (and practice) that adequately reflects both the social and the individual nature of human beings. Feminist perspectives and demands can guide the inquiry: they point to dangers, define aspirations, and indicate the contours of an approach that transcends the limitations of liberal theory while fostering its underlying values. This article is part of that process: an inquiry into the meaning of autonomy, guided by feminist objectives.

### B. *Self-Determination and Social Construction*

The notion of autonomy goes to the heart of liberalism and of the powerful, yet ambivalent, feminist rejection of liberalism. The now familiar critique by feminists and communitarians is that liberalism takes atomistic individuals as the basic units of political and legal theory and thus fails to recognize the inherently social nature of human beings. Part of the critique is directed at the liberal vision of human beings as self-made and self-making men (my choice of noun is, of course, deliberate). The critics rightly insist that, of course, people are not self-made. We come into being in a social context that is literally constitutive of us. Some of our most essential characteristics, such as our capacity for language and the conceptual framework through which we see the world, are not made by us, but given to us (or developed in us) through our interactions with others.

The image of humans as self-determining creatures nevertheless remains one of the most powerful dimensions of liberal thought.<sup>3</sup> For all of us raised in liberal societies, our deep attachment to freedom takes its meaning and value from the presupposition of our self-determining, self-making nature: that is what freedom is for, the exercise of that capacity. No one among the feminists or communitarians is prepared to abandon freedom as a value, nor, therefore, can any of us completely abandon the notion of a human capacity for making one's own life and self.

Indeed, feminists are centrally concerned with freeing women to shape our own lives, to define who we (each) are, rather than accepting the definition given to us by others (men and male-dominated society, in par-

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3. Charles Taylor provides a particularly compelling statement of the importance of this vision in the origins and enduring power of liberal thought. Taylor, "Justice After Virtue," paper presented at Legal Theory Workshop Series, University of Toronto Faculty of Law, 23 October 1987. See also "Atomism," *supra* note 2.

ticular). Feminists therefore need a language of freedom with which to express the value underlying this concern. But that language must also be true to the equally important feminist precept that any good theorizing will start with people in their social contexts. And the notion of social context must take seriously its constitutive quality; social context cannot simply mean that individuals will, of course, encounter one another.<sup>4</sup> It means, rather, that there are no human beings in the absence of relations with others. We take our being in part from those relations.

The problem, of course, is how to combine the claim of the constitutiveness of social relations with the value of self-determination.<sup>5</sup> The problem is common to all communitarians but is particularly acute for feminists because of women's relations to the traditions of theory and of society. It is worth restating the problem in terms of these complex and ambivalent relations. Feminists angrily reject the tradition of liberal theory that has felt so alien, so lacking in language and ability to comprehend our reality, and that has been so successful in defining what the relevant questions and appropriate answers are.<sup>6</sup> Anyone who has listened closely to academic feminists will have heard this undercurrent of rage at all things liberal.<sup>7</sup> Yet liberalism has been the source of our language of freedom and self-determination. The values we cherish have come to us embedded in a theory that denies the reality we know: the centrality of relationships in constituting the self.

That knowledge has its own ironies: women know this centrality through experience, but the experience has been an oppressive one. One of the oldest feminist arguments is that women are not seen and defined as themselves, but in their relations to others. The argument is posed at the philosophical level of de Beauvoir's claim that men always experience women as "Other" (a perverse, impersonal form of "relationship") and in the mundane, but no less important, form of objections to being defined as someone's wife or mother. We need a language of self-determination that

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4. I once heard a(n otherwise) thoughtful liberal theorist dismiss with exasperation the critique that liberal theory fails to take seriously the social nature of human beings. "Of course it does," he said. "Liberal theory is all about the proper rules governing the interaction among people, so, of course it recognizes their social nature." This observation completely misses the point. Drawing boundaries around the sphere of individual rights to protect those individuals from the intrusions of others (individuals or the state) naturally takes for granted the existence and interaction of others. Such an assumption, however, has nothing in common with the claim that a person's identity is in large part constituted by her interactions with others. On this view there is, in an important sense, no "person" to protect within a sphere protected from all others, for there is no pre-existing, unitary self in isolation from relationships.

5. The parallel with old theological debates about the freedom of man and the omnipotence of God is really quite striking. Taylor comments on the relevance of these debates to the emergence of liberalism. "Justice After Virtue," *supra* note 3.

6. It is, of course, not some disembodied Theory, but those who practice it who arouse these feelings. The convention is, however, to indulge in the more polite (and safer) sounding reification.

7. Excepting, of course, liberals who think of themselves as feminists. They take their theoretical framework from liberalism and thus are not part of the enterprise of developing a distinctive feminist theory.

avoids the blind literalness of the liberal concept.<sup>8</sup> We need concepts that incorporate our experience of embeddedness in relations, both the inherent, underlying reality of such embeddedness and the oppressiveness of its current social forms.<sup>9</sup> I think the best path to this end is to work towards a reconception of the term "autonomy."

### C. *Finding One's Own Law*

The word "autonomy" is so closely tied to the liberal tradition that it is often treated as symbolizing the very individualism from which I am trying to reclaim it. Among critics of liberalism one can hear the phrase "autonomous individuals" uttered with the contempt meant to express the absurdity of conceiving of individuals in isolation from one another. But one also hears the word used with approbation, usually in the context of the problem of achieving true autonomy (as opposed to the false liberal autonomy). I think the word itself carries with it the complexity of the issue. The literal meaning of the word is to be "governed by one's own law." To become autonomous is to come to be able to find and live in accordance with one's own law.

I speak of "becoming" autonomous because I think it is not a quality one can simply posit about human beings. We must develop and sustain the capacity for finding our own law, and the task is to understand what social forms, relationships, and personal practices foster that capacity. I use the word "find" to suggest that we do not make or even exactly choose our own law. The idea of "finding" one's law is true to the belief that even what is truly one's own law is shaped by the society in which one lives and the relationships that are a part of one's life. "Finding" also permits an openness to the idea that one's own law is revealed by spiritual sources, that our capacity to find a law within us comes from our spiritual nature.<sup>10</sup> From both perspectives, the law is one's own in the deepest sense, but not made by the individual; the individual develops it, but in connection with others; it is not chosen, but recognized. "One's own law" connotes values, limits, order, even commands just as the more conventional use of the term does. But these values and demands come from within each person rather than being imposed from without. The idea

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8. The fact that contemporary liberals know all about "social conditioning" doesn't seem to change the structure of their concepts. It may mean that they, too, face similar dilemmas but do not choose to make them central to their theoretical inquiries.

9. In developing such concepts, feminists have an advantage in avoiding one of the pitfalls of challenges to liberal individualism: women's experience of relationships as oppressive as well as essential has the virtue of making us less likely to be romantic about the virtues of community as such.

10. Indeed, it may be that the idea of one's own law, as opposed to one's own wishes, presupposes some transcendent, spiritual order of which we are a part. Such a notion need not, of course, be anything like Kant's categorical imperative with its exclusive reliance on man's rationality. See Immanuel Kant, *GROUNDWORK OF THE METAPHYSIC OF MORALS*, trans. H.J. Paton (New York: Harper & Row, 1964).

that there are commands that one recognizes as one's own, requirements that constrain one's life, but come from the meaning or purpose of that life, captures the basic connection between law and freedom<sup>11</sup>—which is perhaps the essence of the concept of autonomy. The necessary social dimension of the vision I am sketching comes from the insistence, first, that the capacity to find one's own law can develop only in the context of relations with others (both intimate and more broadly social) that nurture this capacity, and second, that the "content" of one's own law is comprehensible only with reference to shared social norms, values, and concepts.

This concept has inherent tensions between the idea of autonomy as both originating with oneself *and* being conditioned and shaped by one's social context. Those tensions are the tensions of feminism, and they come from feminism's recognition of the nature of human beings. The word "autonomy" is thus a suitable vehicle for achieving feminist objectives. It is capable of carrying the full dimensions of feminist values and perspectives. And sticking with the word, working toward reconceiving it, has the further virtue of rescuing not only a term, but a basic value, from the confines of liberalism. That is the project of this article.

#### D. *The Objective: Understanding and Overcoming Pathology*

So far we have only a general sense of what some of the ingredients of autonomy must be. I have already mentioned the (problematic) notion of self-determination. I think comprehension, confidence, dignity, efficacy, respect, and some degree of peace and security from oppressive power are probably also components. (Note that these ingredients are both characteristics of individuals and states of being which presuppose certain conditions in intimate and social-structural relationships.) But we have as yet no full or integrated articulation of the values and perspectives I have mentioned. There are many different ways of trying to come to the articulation of a new value or, as in the case of autonomy, to help that value

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11. There is a passage in Ursula K. Le Guin's novel, *THE BEGINNING PLACE* (New York: Harper & Row, 1980), which expresses this connection: "There was no boundary. It was all his country. But this time, this was far enough: he would go no further now. Part of the pleasure of being here was that he could listen for and obey such impulses and commands coming from within him, undistorted by external pressures and compulsions. In that obedience, for the first time since early childhood, he sensed the headiness of freedom, the calmness of power" (p. 27).

Of course this connection is played out in the political realm as well, and entails the same paradox: in a democracy, limited government means self-limiting government. The people must limit themselves. The fictions of constitutionalism try to obscure the paradox: a constitution spells out the limits the people have placed on themselves; those limits once set need not be reconsidered (except in the exceptional circumstances of amendments). The fiction works particularly nicely in the United States, where the Constitution was written so long ago. The reality is, of course, that the limits must be constantly reinterpreted. The "people," in the form of their representatives in the judiciary, must constantly set and reset the limits that they will treat as clear, fixed, and unquestioned. Within these self-defined limits, the collective finds its own law, which is an essential element of collective freedom. I discuss the paradox of self-limiting government more fully in "American Constitutionalism and the Paradox of Private Property," in *CONSTITUTIONALISM AND DEMOCRACY*, J. Elster and R. Slagstad, eds. (Cambridge: Cambridge University Press, 1988), 241–273.

emerge from the process of transforming an old one. Here I want to focus on a particular dimension of our current conception of autonomy that stands in the way of the necessary transformation: the dichotomy between autonomy and the collectivity.

This dichotomy is grounded in the deeply ingrained sense that individual autonomy is to be achieved by erecting a wall (of rights) between the individual and those around him. Property (as I will discuss more fully later) is, not surprisingly, the central symbol for this vision of autonomy, for it can both literally and figuratively provide the necessary walls. The most perfectly autonomous man is thus the most perfectly isolated.<sup>12</sup> The perverse quality of this implicit ideal is, I trust, obvious. This vision of the autonomous individual as one securely isolated from his threatening fellows seems to me to be a pathology that has profoundly affected western societies for several centuries.<sup>13</sup>

If we ask ourselves what actually enables people to be autonomous, the answer is not isolation, but relationships—with parents, teachers, friends, loved ones—that provide the support and guidance necessary for the development and experience of autonomy. I think, therefore, that the most promising model, symbol, or metaphor for autonomy is not property, but childrearing. There we have encapsulated the emergence of autonomy through relationship with others. We see that relatedness is not, as our tradition teaches, the antithesis of autonomy, but a literal precondition of autonomy, and interdependence a constant component of autonomy. This model of what actually sustains autonomy is, appropriately, the opposite of the isolated, distancing symbol of property. We may, in fact, have more to learn about the nature of autonomy by thinking about childrearing than by the sort of inquiry into law and bureaucracy that I undertake here. But there are advantages to avoiding the problems of extrapolating from intimate relationships to large-scale ones. And some of the relationships which either foster or undermine autonomy are not of an intimate variety, but rather are part of the more formal structures of authority (which include employment relations as well as the officially “public” sphere I deal

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12. There is an interesting corroboration of my view of property-based independence as isolation in J.G.A. Pocock's analyses of the relationship between property and autonomy in 17th century liberal thought: “The point about freehold in this context is that it involves its proprietor as little as possible in dependence upon or *even in relations with other people* and so leaves him free for the full austerity of citizenship in the classical sense” (emphasis added). J.G.A. Pocock, *POLITICS, LANGUAGE, AND TIME: ESSAYS ON POLITICAL THOUGHT AND HISTORY* (New York: Atheneum, 1971), 91.

13. For a brilliant discussion of the western conception of the separate self, see Catherine Keller, *FROM A BROKEN WEB: SEPARATION, SEXISM, AND SELF* (Boston: Beacon Press, 1986). She also points to another connection between feminism and the reconception of autonomy: men's fear of women is tied to their fear of the collective. She begins her book (p. 1) with a telling quotation from C.S. Lewis's *SURPRISED BY JOY*: “You may add that in the hive and the anthill we see fully realized the two things that some of us most dread for our own species—the dominance of the female and the dominance of the collective.”

with here). Ultimately, I think the different approaches (and I plan eventually to pursue both) will complement each other.

Here I will focus on how the pathological conception of autonomy as boundaries against others has played itself out in some of the central public institutions of the United States. This approach has the virtue of addressing immediate problems while at the same time moving toward a fuller conception of autonomy. The approach is also suggested by my belief that abstract theorizing alone is not likely to get us where we want to go. If we want to understand the social forms that foster autonomy, we need first to look at actual practices of collective organization that can reveal for us the possibilities of a new understanding of autonomy and help us understand the nature and sources of the limitations of the prevailing conception. Let me turn therefore to the particular problems of autonomy in the American bureaucratic state.

## II. BUREAUCRACY, COLLECTIVITY, AND AUTONOMY

The American bureaucratic state threatens individual autonomy because it threatens to transform the objects of its action from citizens to subjects—dependent, passive, helpless before the power of the collective. This threat is not peculiar to American forms of bureaucracy. Whenever a democratic society assumes collective responsibility for individual welfare, it faces the task of implementing this responsibility in ways that foster rather than undermine citizens' sense of their own competence, control, and integrity. The traditional American conception of autonomy impedes this task and thus limits our understanding of the problem and the potential for its solution. The tradition of American political thought sets individual autonomy in opposition to collective power.<sup>14</sup> This opposition now distorts our perceptions. The characteristic problem of autonomy in the modern state is not, as our tradition has taught us, to shield individuals from the collective, to set up legal barriers around the individual which the state cannot cross, but to ensure the autonomy of individuals when they are *within* the legitimate sphere of collective power. The task is to render autonomy compatible with the interdependence which collective power (properly used) expresses.

The problem of interdependence, individual autonomy, and collective power takes its characteristic modern form in the relations between citizens and administrative bodies.<sup>15</sup> The dependence of citizens on those who

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14. This focus on American political thought provides specificity in looking at how the problem of autonomy fits within a larger framework of political theory. The American treatment of autonomy is particularly focused on boundaries (as we shall see later), but it is not unique. On the contrary, I think it helps us understand a problem characteristic of all liberal thought.

15. In the course of my discussion I will use both the terms "state power" and "collective power." I am addressing the broad problem of the tension between individual autonomy and the power of the collective. In our political system that power is ordinarily exercised by the state, and thus in most contexts it is appropriate to refer to state or governmental power; but part of my argument is that the

apply policy to their particular cases poses a problem distinct from the traditional issues of democracy. The extent to which the policies administered are formulated by bodies (e.g., elected legislatures) which citizens have democratic access to and control over continues to be an important issue. But it is no longer the only one.

Even if legislative policy-making were democratically optimal, citizens in the modern state would still be subject to the decisions of administrators. People's knowledge that the policies behind these decisions were made in some distant way with their consent may do little to ease their sense of dependence and helplessness. (The distant quality of consent seems likely to prevail in any large-scale society, even when the forms of democracy make citizen participation active, widespread, and effective.) The nature of people's interactions with bureaucratic decision-making may be as important as the nature of legislative policy-making<sup>16</sup> in determining whether citizens are autonomous members of a democratic society or dependent subjects of collective control.

The objective of making the direct exercise of collective power conducive to the autonomy of those subject to it requires more than a shift in focus from legislation to administration. We also need to see that our traditional focus on protecting the individual from the collective has given us a distorted image of the problem of autonomy and of alternative visions of society. The prevailing conception of autonomy sets alternatives in the context of a false choice: when autonomy is identified with individual independence and security from collective power, the choice is posed between admitting collective control and preserving autonomy in any given realm of life. It is as though the degree of collective responsibility for, say, the material needs of citizens must result in a corresponding decrease in the autonomy of those receiving the benefits. Such a dichotomy between autonomy and collective power forecloses a whole range of social arrangements—at least to anyone who values autonomy. A classic example of a choice premised on this dichotomy is the claim that a free press is possible only if newspapers are privately owned. This claim rests on a notion of what the law can and cannot do which is unfounded. It assumes, first, that the law can protect property against the power of the collective and that this protection will provide the necessary insulation and foundation for freedom of expression. At the same time, the claim assumes that the

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tension will endure however collective power is organized. The analysis therefore should be relevant both to alternative political systems and to the non-governmental power exercised by such "private" entities as corporations.

16. The legislative and bureaucratic "models" of democratic citizenship are in some ways in tension with one another. If the legislature managed to make all policy decisions, if it were possible to formulate rules which neutral, efficient bureaucrats could apply mechanically (i.e., without evil degrees of discretion), citizens would be spared the sense of being subject to arbitrary control. But they would also have little scope for participation in the decisions on their own cases. While this may be advantageous from one point of view, it may seriously undermine the autonomy of citizens directly subject to governmental action over which they feel they have no control.



law cannot provide comparable *direct* protection of this freedom by legal limits on the power of the state to control expression. The implicit conclusion is that if there were public rather than private ownership of the press, those wishing to express their views would require the (virtually uncontrollable) "permission" of the state.

This conclusion denies the possibility of structuring the relations between citizen and public press, their corresponding rights and powers, in a way compatible with freedom of expression. But we need no more assume that the relationship would take the form of "asking permission" to use the press than we assume the necessity of asking permission to use public schools, parks, or water. There is nothing in the nature of the legal protections themselves (as I shall return to later) nor in our experience of public resources to justify the stark dichotomy between freedom founded on private property and tyranny produced by collective control.<sup>17</sup>

State control of resources always poses problems, but the American legal system has found ways of distinguishing control from caprice, of rendering dependence upon state services (imperfectly) compatible with freedom and autonomy. Were the dichotomy between state power and autonomy exhaustive and inevitable, we would be forced either to give up on autonomy in large spheres of our lives or to advocate a vast limitation on state power, which would be incompatible both with modern economic and political realities and with aspirations for a more communal and equitable society. This choice is not necessary. Despair about individual freedom in the face of collective power reflects a poverty of imagination about the possibilities for protection and control.

Belief in the false choice between autonomy and collective power is the product of a powerful tradition of political thought. Paradoxically, the tradition (mis)shapes the perception of the problem while pointing in the direction of solutions. Our legal tradition itself suggests the possibilities of protection and control. To see both the problem and the possibilities more clearly, we need first to examine the tradition.

### III. AUTONOMY AND PROPERTY IN THE AMERICAN TRADITION<sup>18</sup>

#### A. *Boundaries and Dichotomies*

Our political tradition has virtually identified freedom and autonomy with the private sphere, and posed them in opposition to the public sphere of state power. The idea of a boundary between these spheres, a line di-

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17. The example of airwaves, of course, points to the complexity of governmental control. The government has assumed a much larger role in regulating the electronic than the written media, on the grounds of regulating a finite public resource. One need not be sanguine about the history of this regulation to see that public control can take a wide range of forms.

18. The arguments in this section are spelled out more fully in Jennifer Nedelsky, *PRIVATE PROPERTY AND THE LIMITS OF AMERICAN CONSTITUTIONALISM: A VIEW FROM THE FORMATION*, forthcoming from University of Chicago Press.

viding individual autonomy from the legitimate scope of state power, has been central to the American conceptions of freedom and limited government. The notion of a boundary took shape in the early development of our Constitution, and it was property which was the focal point for this idea. While parts of this story are well known, they bear a retelling (and reformulation) here as the framework for the prevailing conception of autonomy.

The revolutionary slogan "no taxation without representation" posed consent as the basis for legitimacy. It asserted not that private property could never be taken by the state, but that such taking was legitimate only if consented to by the governed. This idea also took the form of claims that a government which could take property without consent was tyrannous and reduced men to slaves. These claims reflected the sense that the major threat to freedom and autonomy was the inability to have some say in the decisions which affected important aspects of one's life. But this emphasis on consent shifted with the grim realization that consent alone was no guarantee against injustice or tyranny.<sup>19</sup>

In the 1780s duly elected state legislatures passed a variety of debtor relief laws which were widely viewed as violations of property rights and as evidence of the intrinsic vulnerability of property (and, more generally, minority) rights under popular government. The concern turned to making popular government compatible with the security of individual rights and to asserting as a matter of political principle that consent was not a sufficient basis for legitimacy. "Rules of justice"<sup>20</sup> and the concept of basic rights formed independent standards against which to measure the legitimacy of democratic outcomes. The need to inculcate these independent standards, and the particular preoccupation with protecting property against tyranny by the majority, led to a differentiation between civil and political rights and a clear hierarchical relation between them. Political rights were merely means to the true end of government: the security of private or civil rights. This security itself, as well as the principle of consent, required some form of representative government. But for the Federalists—whose views triumphed in the writing of the Constitution and in the dominant tradition of American political thought—the focus of concern was not on designing means for men to have an active share in their own governance, but rather designing means to contain, control, and minimize the threat of popular political power. There is virtually nothing in Federalist thought which treats political participation as an important component of individual autonomy, as a dimension of self-determination with intrinsic value.<sup>21</sup>

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19. See Gordon Wood, *CREATION OF THE AMERICAN REPUBLIC, 1776–1787* (Chapel Hill: University of North Carolina Press, 1969).

20. *THE FEDERALIST* No. 10 (J. Madison).

21. The Anti-Federalists did treat political participation in this way. See Nedelsky, *Confining*

The Federalists drew on a tradition (Locke, for example) which emphasized rights as the object of legitimate government and hence the limit to it. But in the context of the American fear of *popular* tyranny, the conception of rights as limiting values hardened into opposed categories of state vs. individual and public vs. private. Individual autonomy was conceived of as protected by a bounded sphere—defined primarily by property—into which the state could not enter. The sphere of rights, freedom, autonomy was private. And the means of assuring those rights, that autonomy, was to keep the public realm distant, separate, at bay. The people (in a highly mediated, carefully structured system of government) would control the public realm: collective decisions would be taken on democratic principles. But every effort was made to minimize the chances of those decisions encroaching on the private realm. The idea of a boundary to the legitimate scope of the public realm then crystallized in judicial review. And, as in the earlier conception of divided spheres, property was the central issue around which the idea of judicially enforceable boundaries developed.

There was, finally, another dimension to the parallel divisions between state and individual, public and private: the opposition between politics and market. This dichotomy was part of the conceptual framework which placed freedom and autonomy on the side of the “individual,” “private,” and “market” and coercion on the side of the “state,” “public,” and “politics.” The coercive power of the collective was given free expression in legislation. The rights of individuals (private rights), by contrast, were given order, protection and scope through the common law, which permitted market transactions—ostensibly without the coercive intervention of the state, without the purposive, collective decision-making of the legislature.<sup>22</sup> Free, private, individual (trans)actions stood in defensive opposition to coercive control by collective (public, legislative) power.

We now have a picture of a legal and political ideology which identified autonomy with a private sphere defined and bounded by property. This was the conceptual framework which prevailed (despite major deviations from it in practice) until 1937,<sup>23</sup> and which continues to haunt and shape both theory and practice.

Three things need to be said about this picture of law, state, and autonomy. The first (which in its full dimensions is beyond the scope of this paper) is that the dichotomous categories of liberal theory have always been illusory. Second (and only apparently in contrast), these categories

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*Democratic Politics: Anti-Federalists, Federalists, and the Constitution* (Book Review), 96 HARV. L. REV. 340 (1982).

22. Friedrich A. Hayek offers a particularly clear statement of (and argument for) these contrasts in our tradition in his *LAW, LEGISLATION, AND LIBERTY*, Vol. 1, Chs. 5 and 6 (Chicago: The University of Chicago Press, 1973).

23. This was the date of *West Coast Hotel v. Parrish*, 300 U.S. 379 (1937), which is the conventionally recognized turning point in a long process.

and constellations of beliefs, and their related concepts of the rule of law and the sanctity of property, could not have had such power and endurance if they were based on illusion only. If I am right that their meaning was not what it purported to be, then our task is to discover the truths which lay behind them. Third, whatever the subtle truths behind the tradition, its basic components of property and boundary are no longer adequate to the contemporary problems of autonomy. I shall begin with the illusions, turn to the particular inadequacy of property, and then note the insights this misleading tradition nevertheless provides.

### B. *Illusions*

The dichotomies of state-individual, public-private, politics-market, legislation-common law were always illusory. The central part of the illusion was the association of freedom with the second term of each dichotomy and coercion with the first. It is not simply that things have changed so much that the categories no longer make sense. Rather, the dichotomies from the beginning served to mask the role of state power in the second set of terms.<sup>24</sup>

To take a central example, property rights are defined by the legal system. The security they provide rests on the power of the state to punish those who trespass on those rights. And the power and independence which individuals derive from property rests on the rules the legal system has set up to define what constitutes legitimate and enforceable transactions, what goods can be demanded on the basis of what sorts of claims. Property takes its power and importance in large part from "the market"—which is itself defined by the legal system. "The market" is not a freestanding, natural phenomenon, but consists of rules defined by law and backed by the power of the state.<sup>25</sup>

Only a radical difference between common law and legislation (such as Friedrich Hayek eloquently, but in the end unpersuasively, defends<sup>26</sup>) can maintain the claim to the essential privateness and freedom of property and the market. But the actual workings of the common law have not

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24. Theodore Lowi, *THE END OF LIBERALISM*, 2d ed. (New York: W.W. Norton and Company, 1979), and Robert Dahl and Charles Lindblom, *POLITICS, ECONOMICS, AND WELFARE* (Chicago: University of Chicago Press, 1976), offer graphic illustrations of the inaptness of similar traditional categories.

25. There can, of course, be markets where there is no legal system like ours. Custom alone may define both rules and sanctions. Even in our society there are areas of commercial transaction governed largely not by law, but by agreement among parties with adequate enforcement power of their own. I leave aside for the moment whether these customary norms constitute a form of collective power radically different from that exercised through legislation. But, in any case, in our system "the market" consists essentially of legal rules and is in that sense a creature of the state.

26. Hayek, *supra* note 22, argues that the common law is neutral, non-purposive, and the articulation of spontaneously arising custom. It is "the law of freedom" because it merely provides the framework for the exercise of freedom. Legislation, by contrast, is aimed at the achievement of some collective purpose and must by its nature be coercive.

been Hayekian.<sup>27</sup> They have not had the essential lack of purposiveness he claims. The common law has been informed and shaped by particular conceptions of fairness, freedom, and progress. The “neutral” rules of the game correspond to a particular vision of the good society which gives advantages to some players over others in systematic, if not perfectly predictable ways.

I have embarked on this both overly long and too abbreviated argument about property, the market, and the common law to show that the long prevailing conception of autonomy was embedded in a set of categories and oppositions that were in basic ways illusory. And to the extent that the contrasts are illusory, the choices they point to are false.

Property is the creature of the state. To replace property as the symbol and source of autonomy may redefine the relations between citizens and the state. But the choice to do so (as in the free press example above) is not a choice between private and free on the one hand and collective and coercive on the other. Because reality has never corresponded to these neat oppositional categories, there is no need to choose between them. Freeing ourselves from misleading categories and false choices opens the possibility for individual autonomy in the context of collectivity.

### C. *Contemporary Inadequacies*

While the dichotomies of liberal theory have always been illusory, there is a particular inadequacy to the role played by property today. Private property was for 150 years the central and defining instance of the boundary between governmental authority and individual autonomy. Property can, however, no longer serve this function because it has lost its original political significance.

Property no longer provides people with the basis for independence and autonomy in the eighteenth-century sense. For the farmer who tilled his own land or the craftsman who owned his tools, property was a real source of independence. However much they depended on good weather or customers, their property gave them a control over their livelihood, and hence their independence, which was radically different from that of modern wage earners, salaried professionals, or stockholders. The dependence of wage earners on their employers is obvious. But even stockholders, who own their shares, have little control over the source of their income. Their income, like that of most professionals, embeds them in a network of relationships characterized by interdependence rather than independence. The percentage of Americans for whom property provides the traditional inde-

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27. Morton J. Horwitz's *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860* (Cambridge: Harvard University Press, 1977) provides the clearest evidence of this. Even critics who challenge many of Horwitz's claims do not present a picture of the common law as having the natural and undirected quality which is a central part of Hayek's picture.

pendence of the yeoman farmer is now so small that the idea of property as the basis for autonomy has lost most of its original meaning.<sup>28</sup> In addition, property itself is now subject to regulation to such an extent that it cannot serve symbolically or substantively as the boundary between individual rights and governmental power.<sup>29</sup>

Moreover, the very idea of an inviolable sphere can no longer be the central issue of autonomy in the modern state.<sup>30</sup> As more and more issues are seen in terms of collective rather than individual responsibility, there will be fewer and fewer spheres of activity in which the state is not involved. As the reality of interdependence shapes the scope of collective action and control, citizens will increasingly be subject to governmental authority to license, regulate, and distribute benefits. The model for autonomy must be integration, not isolation. The task is to make the interdependence of citizen and state conducive to, rather than destructive of, autonomy.

We have some reason to be optimistic about finding the means of doing so. The old dichotomies prove to be misleading. And, as the final section of this article will suggest, contemporary administrative law gives glimpses of what such means might be like. But in reconceiving autonomy, in reconstituting its sources and protections, we should also try to uncover the truths which have sustained the traditional framework for so long.

#### D. *Lessons for Reconceiving Autonomy*

There are, of course, explanations other than truth for the endurance of ideology. Those in power usually have considerable resources for fostering

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28. The importance of property has never been simple. Even in 1787, many of the Framers derived an important part of their income from complicated transactions in bonds and speculative ventures in joint stock companies. Certainly not all of these men shared Jefferson's vision of an agrarian republic. But they did see a close connection between wide-spread, small-scale ownership of property and political independence, and they feared the day when wage labour would sever that connection. Important dimensions of the connection have now disappeared, leaving behind, perhaps, residual dreams of home ownership as the last widely available form of autonomy sustained and protected by property. The receding reality of the property-autonomy nexus is not the same as the advantages and insulation wealth continues to provide.

29. There is, of course, the related but distinct question of whether some form of property is essential for autonomy. If property is so broadly defined that it means the concrete expression of autonomous action, then, practically tautologically, autonomy requires property. Such a definition leaves entirely open the practices of use, possession, alienation, and advantage that we associate with property. Margaret Radin has tried to distinguish between those dimensions of conventional property essential for what she calls personhood and those unsuitable to and even destructive of that value (which, I think, includes, but is not synonymous with autonomy). See Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982). The extent of my claim here is that the current meaning of property no longer stands in any clear or necessary relation to autonomy.

30. The problem of boundaries does not disappear. Part of the task of ensuring the good society is to redefine the relation between citizen and state, individual and collective. That task includes identifying those realms which should be considered private, beyond the scope of collective control. My point is that the definition of such boundaries cannot be the only basis for autonomy in a society which recognizes individual responsibility to the collective and collective responsibility for social and individual welfare.

beliefs which sustain the status quo. But it seems likely that when particular conceptions have endured for centuries in both the popular imagination and theoretical writings, they can provide insights into the problems they address. It is not possible here to unpack everything embedded in the tradition I have outlined. But we can examine some of the directions the tradition points to, some of the problems it alerts us to in the effort to reconceive autonomy.

The first is that while the stark opposition between autonomy and collectivity presumed in the American tradition is misleading, that opposition also reflects a basic truth. There is a real and enduring tension between the individual and the collective, and any good political system will recognize it. The problem with our tradition is that it not only recognizes, but highlights the tension, and has a limited view of the non-oppositional aspects of the relation and of the social dimension of human beings. There is thus a twofold objective in reconceiving autonomy: (1) to recognize that the irreducible tension between the individual and the collective makes choices or trade-offs necessary; and (2) at the same time, to move beyond a conception of human beings which sees them exclusively as separate individuals and focuses on the threat of the community. The collective is not simply a potential threat to individuals, but is constitutive of them, and thus is a source of their autonomy as well as a danger to it.<sup>31</sup> For some purposes it makes sense to talk about the separate constructs of "the individual" and "the community." But those constructs are misleading<sup>32</sup> if they obscure the fact that people do not exist in isolation, but in social and political relations. People develop their predispositions, their interests, their autonomy—in short, their identity—in large part out of these relations. The very way one experiences and perceives the world, for example, is shaped by the social constructions of language. The task, then, is to think of autonomy in terms of the forms of human interactions in which it will develop and flourish.<sup>33</sup> And the starting point of this inquiry must be

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31. The childrearing model is helpful here: parents are both a source of a child's autonomy and a potential threat to it. It is easy to see that the powerful relationship of dependency children have with their parents is a necessary foundation for the child's autonomy. But the relationship can also be structured in ways that undermine autonomy, that maintain dependence. It is probably the case that all relationships necessary for autonomy can easily be perverted to undermine it.

32. In our current discourse it is hard to avoid such misleading language. The concept of "self-determination," which I described as central to autonomy, carries the tension implicit in the problem itself. Few people in our culture believe that people are truly self-determining. It is commonly accepted that people are shaped to a great extent by their culture and genetic make-up. Yet self-determination remains an important value and aspiration. The new conception of autonomy must give force to the aspiration while incorporating a recognition of interdependence.

33. Bruno Bettelheim offers a brief but fascinating discussion of the kinds of relations which foster autonomy. In his account they are direct and personal rather than large scale, anonymous, or abstract. If his views are correct, we can both understand something about why autonomy has been associated with the private sphere and see that the relevant characteristics are possible in spheres not conventionally considered private. Bettelheim offers as examples both the relation to parents and to teachers. Bruno Bettelheim, *THE INFORMED HEART: AUTONOMY IN A MASS AGE* (Glencoe, Ill.: Free Press, 1960), 95-97.

an attention both to the individuality of human beings and to their essentially social nature. The hope is that a society with such an outlook could escape some of the problems of our more limited perspective and could structure relations of community which also fostered autonomy.

The tradition warns us, however, that there is probably an inevitable trade-off between collective cohesion and responsibility on the one hand, and individual freedom and autonomy on the other—at least as we currently understand these concepts. The individualism of liberal capitalism has never actually provided all citizens with its proclaimed values of freedom and independence. But our system has made comparatively few demands on its citizens and has left a wide scope for individual choice. American democratic capitalism has neither demanded nor fostered excellence, virtue, commitment, social or civic responsibility (which is not, of course, to say that none of these ever emerged). A society which seeks to promote these characteristics will have a far greater interest in the values its members hold, the relationships they form, and the way they choose to spend their time and their talents. Such a society will almost certainly be more demanding and constraining in those areas, leaving fewer spheres of action to private choice.

Ultimately, the objective is to find the optimal relation between individual and collective and, more particularly, to understand the core of human autonomy and the forms and scope of collective activity that will foster it. We can take from the tradition a recognition that the new forms of autonomy within collectivity will involve choices, even trade-offs. But the limitations of our current conceptions should lend us confidence that to choose new forms of autonomy is to reconstitute it, not abandon it.

The tradition also offers us a way of grasping the essence of autonomy. An understanding of the powerful associations between property, security, and autonomy is likely to provide a better sense of the nature of autonomy and the requirements for it. (This despite the fact that autonomy in a collective state will be quite different from the individualistic, oppositional model associated with property.)

The rhetorical, even mythical power of the identification of property with freedom goes beyond the literal power and advantages of property under liberal capitalism. And the experience of the rights of property as qualitatively different from and more secure than other legal rights cannot be accounted for by the legal history of property rights. Property rights have in fact been subject to a great deal of state interference and to redefinition which amounted to destruction.<sup>34</sup> As I argued earlier, there is nothing intrinsic about legal rights of property which make them a more promising basis for freedom than other legal rights. Property rights, like

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34. See M. Horwitz, *supra* note 27, and Scheiber, *Property Law, Expropriation, and Resource Allocation by Government in the United States, 1789–1910*, 33 J. ECON. HIST. 232 (1973).



all legal rights, take their formal meaning from definitions and guarantees provided by the state. The security which property provides rests, on an institutional level, on the state's power to protect what it defines as property. And the forms and means of defining and protecting property are, at root, indistinguishable from those of other legal rights.

What then accounts for the enduring associations between property and autonomy? Two striking and distinguishing characteristics of property are its concreteness and the relative unobtrusiveness of the state power which lies behind it.<sup>35</sup> The concreteness of property makes it an effective symbol. It is easy for people to see the relationship between owning property and autonomy, and it seems (deceptively) easy to know what property is and when it is violated. And most people do not think of their ownership of property as in any way involving the state; it is simply theirs. It is not granted to them by the state or administered by the state. Most property rights can be exercised most of the time without the obvious intervention of the state. The fact that property rights only have meaning when backed by the power of the state seems an abstraction that students have a hard time grasping, many sophisticated theorists ignore entirely, and the general population has no idea about. Due process, by comparison with property, is abstract rather than concrete and clearly requires official action. If these are the characteristics which make the association of property with freedom so compelling, we should be alerted to the probable limitations of due process as an alternative source, symbol, or protector of autonomy.

Finally, my comments about property reflect a more general approach to the problem of autonomy and to what tradition and current practices can teach us about it. Autonomy is an elusive problem in part because it is practically inseparable from an experience or feeling.<sup>36</sup> In an earlier version of this article I added the qualification that "It would, of course, seriously distort any political analysis of autonomy to treat it as a 'mere' feeling. One can evaluate the degree of autonomy an individual is actually capable of exercising, and there can be disparities between experience and reality." This qualification was an effort to meet the objection that people

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35. This argument is elaborated in J. Nedelsky, *supra* note 11.

36. It is important to avoid a misunderstanding about the "mere subjectivity" of feelings. In my view, feelings have two dimensions not commonly associated with the word: (1) There is a truth about feelings. One can be right or wrong about them. Thus while they are subjective in the sense that only the person having the feeling is "authoritative" on whether she feels something, her true feelings are not simply whatever impression, or experience, or sensation she has at the moment. A person must inquire internally to determine her true feelings. They may be hard to discern, there may be confusion, but there is in the end a right answer to what she really feels. (2) The related point is that feelings are, at least in our culture, not always immediately ascertainable. There is a commonplace association between the word "feeling" and something like the experience of a pin prick. One feels pain. No inquiry is necessary. The experience is immediate and obvious. The perception is instantaneous and (under normal circumstances, excluding states of hypnosis or delusion) infallible. But this association is misleading. Even a feeling like anger is by no means always obvious. Only the "feeler's" statements are authoritative, but she can be mistaken. In our culture most people seem to need to learn to recognize the signs by which one can tell the truth of a feeling.

may be deluded about what provides them with autonomy.<sup>37</sup> In fact, I think people may be very wrong in their opinions about the relation between autonomy and institutions or practices. But I doubt that it makes sense to say they could actually feel autonomous and not be so.<sup>38</sup> However, just as we need to develop a new conception of autonomy, probably most of us need to learn what real autonomy feels like.

Our actual experiences of autonomy—those rare moments when we feel that we are following an inner direction rather than merely responding to the pushes and pulls of our environment—are so fleeting that it is often difficult to know or remember what it is like to live by one's own law. And our society misleads us about the very nature of autonomy as well as the conditions for it. We not only learn, as I noted above, that the essence of autonomy is the power to close out others; we are also taught that money is power and power is freedom—and the power is from and over others, not inner power.<sup>39</sup> We are taught that the capacity to manipulate our environment is the power of freedom. A participant at the Yale Legal Theory Workshop, where an earlier version of this article was presented, suggested that those who feel autonomous are those who believe that their actions generate predicted and desired results, as opposed to those who feel powerless to control their lives, who feel buffeted about by forces beyond their control. (This notion of autonomy, he pointed out, has the virtue of being measurable.) In fact, many people learn to “play the game” effectively, to do what is wanted of them, and to confidently reap the rewards handed out for compliance. This counts as success and generates the feeling he described. It is not autonomy. Playing someone else's game well is not defining the path of one's own life.

These perverse messages about autonomy contain a germ of truth: powerlessness is destructive of autonomy. And the question of power points to the ways autonomy entails, but does not consist in, a feeling. Autonomy is a capacity, but it is unimaginable in the absence of the feeling or experience of being autonomous. The capacity can be destroyed by being subjected to the arbitrary and damaging power of others.<sup>40</sup> Power relations are, in that sense, an external, “objective” reality. To be auton-

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37. I think the qualification was also, less consciously, a response to the sense that taking subjectivity seriously was unacceptable in academic theorizing about law and politics. And, indeed, despite the disclaimer, a commentator on the paper wittily objected that, “If autonomy is a feeling, there are pharmacological solutions to the problem.” I think that is clever, but wrong. Perhaps I have too little faith in modern technology and/or too little experience with drugs, but I can imagine a drug making one feel euphoric, maybe even happy, but not autonomous.

38. Of course, to ascertain someone's feeling of autonomy, it would be necessary to communicate effectively about the content of the value and the experience, not simply ask for a response to a term, “autonomy.”

39. The distinction between power over others and empowerment, a power from within, is discussed in Starhawk, *TRUTH OR DARE: ENCOUNTERS WITH POWER, AUTHORITY, AND MYSTERY* (San Francisco: Harper & Row, 1987).

40. Bettelheim's *THE INFORMED HEART*, *supra* note 33, is a study of the extreme case of such destruction in concentration camps.

mous a person must feel a sense of her own power (which does not mean power over others), and that feeling is only possible within a structure of relationships conducive to autonomy. But it is also the case that if we lose our feeling of being autonomous, we lose our capacity to be so. Autonomy is a capacity that exists only in the context of social relations that support it and only in conjunction with the internal sense of being autonomous.

Although I define autonomy as a capacity and not a feeling, I insist upon the feeling of autonomy as an inseparable component of the capacity for several reasons. First, I think the capacity does not exist without the feeling. Second, I think the feeling is our best guide to understanding the structure of those relationships which make autonomy possible. Third, focusing on the feelings of autonomy defines as authoritative the voices of those whose autonomy is at issue. Their autonomy is then not a question that can be settled for them by others. The focus on feeling or internal experience defines whose perspective is taken seriously,<sup>41</sup> and by turning our attention in the right direction it enhances our ability to learn what fosters and constitutes autonomy. For the purpose of evaluating institutions, one can generate a list, or at least a sense, of the components or dimensions of autonomy and then try to identify the practices that seem to foster some or all of those components. To that extent one would be engaged in an "objective" inquiry. But the underlying concern would be the actual experience of autonomy. We cannot understand or protect, much less reconceive, autonomy unless we attend to what gives citizens a sense of autonomy, to what makes them feel competent, effective, able to exercise some control over their lives, as opposed to feeling passive, helpless, and dependent.<sup>42</sup>

But this ingredient of subjectivity introduces an added complication. The institutions, social practices, and relations that foster the feeling of autonomy may vary considerably across cultures and over time within a culture.<sup>43</sup> These variations raise the question of whether one form and experience of autonomy (and the institutions that sustain it) can be judged to be superior to another. (Such a judgment is, of course, implicit in this article.) Recognizing subjective experience as an essential component of

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41. I owe this insight to Lucinda Finley.

42. A government's efforts to encourage its subjects to feel autonomous when they are not is obviously a perversion. The recent history of administrative hearings may provide evidence of the relation between the actual effectiveness of citizen-participation and the way hearings make participants feel about the process, the decision, and their role in it. See Handler, *Justice for the Welfare Recipient: Fair Hearings in AFDC—The Wisconsin Experience*, 43 SOC. SERV. REV. 12 (1969); Hammer and Hartley, *Procedural Due Process and the Welfare Recipient: A Statistical Study of AFDC Fair Hearings in Wisconsin*, 1978 WIS. L. REV. 145.

43. For example, the much vaunted freedom of mainstream North-American life seems to many Native Americans to entail patterns of work with such extreme regimentation as to be incompatible with freedom or autonomy. (Brian Slattery of Osgoode Hall Law School provided me with this example from his work with Native peoples.) Of course, this observation leaves open the question whether the participants in the mainstream patterns of life actually experience their lives as autonomous.

autonomy invites all the much debated problems of objectivity and universal truths—which are beyond the scope of this article. Here I want only to draw attention to feelings as a basic dimension of the abstract concept of autonomy, and to note that feminist theory is becoming increasingly practiced in dealing with these issues.

Recognizing the subjective element of autonomy is also important because the very fact that autonomy is in part a feeling may make people particularly resistant to changes in its form. Bruno Bettelheim, for example, suggests that the ancient nomads, as they watched society shifting to agriculture, may have responded with anxiety and contempt as they saw their fellows give up “for greater economic ease and security, a relative freedom to roam.”<sup>44</sup> In this instance, Bettelheim is willing to make a tacit judgment that the new settled life was not, in fact, a diminished one. But he does suggest that real accommodations had to be made. Because, as I argued above, trade-offs are probably inevitable, hostility to new approaches to autonomy may be based on real perceptions of loss. Perhaps it is even likely that the new approach will draw the contempt Bettelheim mentions. Perhaps all alternatives to what has been perceived as the essence of freedom are likely to be cast by anxious critics in terms of the basic (and base) needs, as libertarians, for example, dismiss as mere envy or greed claims that economic equality is a precondition of autonomy.

Acknowledging the complexities of understanding, comparing, and evaluating feelings of autonomy, it is still useful to look to actual practices that seem to have fostered this feeling, or at least have been associated with the concept. Past practices, however deficient, may provide important clues to new sources of autonomy and to the problems they are likely to entail. And present practices offer concrete examples of the efforts to reconcile autonomy with collective control. Let us turn therefore to what the present has to offer us.

#### IV. THE INSIGHTS OF ADMINISTRATIVE LAW

##### A. *The Potential of Due Process*

My objective in this section is to point to those aspects of contemporary administrative law which suggest the kinds of values and practices needed to make autonomy more viable in a bureaucratic state.<sup>45</sup> I shall start with

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44. Bettelheim, *supra* note 33, at 45.

45. I do not mean to suggest anywhere in this article that a bureaucratic state is inevitable. And it seems quite possible that, ultimately, bureaucracy is incompatible with autonomy. Kathy Ferguson certainly thinks so. She has argued very persuasively that whenever people are being “managed” by others, something is wrong. The main point of her book (*THE FEMINIST CASE AGAINST BUREAUCRACY* [Philadelphia: Temple University Press, 1984]) is the claim that there are viable and vastly preferable alternatives to bureaucracy. But as I noted at the outset, the hope is to find in our present practices clues to better solutions to the general problem that arises when there is both collective control and the mediate application of collective decisions. Only a very small community could avoid the latter. I remain agnostic on the question of whether that is what we should aspire to. And without

the positive contributions of contemporary American law and then identify some of its problems—problems that reflect the errors our tradition invites and the difficulty of avoiding them.

Administrative law mediates between governmental agencies and the citizens subject to their decisions. It defines the rights and obligations of both parties, and it has in recent years shown impressive—if flawed—attention to the problem of making dependence upon governmental benefits compatible with autonomy. The chief contributions of the law are to be found in the “due process explosion” (followed by retrenchment) signalled by *Goldberg v. Kelly*.<sup>46</sup> In that now famous case, the Supreme Court adopted the idea that welfare payments were the kind of benefit—a form of “new property”<sup>47</sup>—which could not be taken away without due process. Specifically, the Court held that a welfare recipient was entitled to a hearing *before* benefits were terminated.

The Court stressed the fact that welfare recipients were dependent on government for their basic necessities and that this made the provision of a pre-termination hearing particularly important. This case seems to be an instance of an effort to provide some degree of control and effectiveness to those in the most dependent relation to the government. The opportunity to be heard by those deciding one's fate, to participate in the decision at least to the point of telling one's side of the story, presumably means not only that the administrators will have a better basis for determining what the law provides in a given case, but that the recipients will experience their relations to the agency in a different way. The right to a hearing declares their views to be significant, their contribution to be relevant. In principle, a hearing designates recipients as part of the process of collective decision-making rather than as passive, external objects of judgment. Inclusion in the process offers the potential for providing subjects of bureaucratic power with some effective control as well as a sense of dignity, competence, and power. A hearing could of course be a sham, or be perceived to be so even if it were not. But the possibility of failure or perversion of the process leaves its potential contribution to autonomy unchanged.

This case and the (shifting) trend it started is of interest because it suggests something important about the possibility of achieving autonomy within a context of dependence. Dependence is a reality, and will be a reality in any system based on collective responsibility for the material well-being of some or all of its citizens. The problem is to avoid making autonomy a casualty of such collective responsibility. *Goldberg v. Kelly* suggests that there are forms of participation in administrative decisions

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waiting to figure that out, I think we can make progress on the question of autonomy.

46. 397 U.S. 254 (1970).

47. The phrase and the idea come from Reich, *The New Property*, 73 YALE L.J. 733 (1964).

which may prevent citizens from becoming passive subjects. The relationship can be shaped by the nature of the decision-making and the citizen's role in it. The nature of the citizen's relation to the agency to which he or she is subject need not be dictated by the substance of the agency's power, e.g., to grant or withhold basic necessities. This enormous power and corresponding dependency will affect, but need not destroy, the citizen's autonomy.

Most of the contributions of contemporary administrative law are of this order: provisions for participation in one form or another. (The expansion of standing—the rules defining who may challenge agency decisions in court—is a related development.<sup>48</sup>) My purpose here is not to analyze the line of cases through which the rights to hearings have been elaborated and restricted, but rather is to suggest that the cases reveal something important about the possibility of autonomy in the modern state and the requirements for it. The components of autonomy to which these legal developments seem responsive are dignity, efficacy, competence, and comprehension, as well as defense against arbitrariness. However mixed the cases, they provide some hope that there are ways of structuring bureaucratic decision-making so that the relations between citizen and state foster rather than undermine these values.

### B. *The Limits of Due Process*

Of course, legal rules alone will not determine whether bureaucratic encounters actually promote autonomy. Joel Handler offers an account of the failures of a federal law (Education for All Handicapped Children Act, P.L. 94-142) which seems designed to ensure optimal conditions for interaction between parents of handicapped children and the officials who will determine the children's placement.<sup>49</sup> The law has all the ingredients one might want: it requires ongoing participation by the parents in the decision-making, flexibility, individual tailoring of programs, hearings, and full rights of appeal. But stipulating these requirements does not make them a reality. In particular, it does not mean that parents actually take an active part, that they are listened to, or that they feel as though they are actors in the decision-making rather than (indirect) subjects of it.<sup>50</sup> The schools have strong incentives of time and money not to have the

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48. See *Sierra Club v. Morton*, 405 U.S. 727 (1972); compare *United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669 (1973).

49. In terms of substantive outcomes, the provision of education for handicapped children, Handler considers the law largely a success. It is specifically with regard to the relationship between the clients and the official decision-makers that there is a striking disparity between the admirable intentions and language of the law and its actual effects. Joel F. Handler, *THE CONDITIONS OF DISCRETION: AUTONOMY, COMMUNITY, BUREAUCRACY*, Ch. 5 (New York: Russell Sage Foundation, 1986).

50. There is, of course, an unusual quality to these decisions since their actual subject, the child, is often not a participant (although the Madison plan calls for them to be when appropriate). The more general problem of structuring autonomous dependence, when the subject of the decision must

parents actively involved, and they have been successful in complying with the formal requirements of the law while undermining its purposes.

Handler's message is not, however, that bureaucratic encounters cannot be structured so that clients are genuinely autonomous actors; it is merely that formal law alone cannot achieve this end. Indeed, he provides a detailed example<sup>51</sup> of the schools in Madison, Wisconsin, which seem to have achieved genuine participation, and to have done so with similar (only this time actually realized) means: participation, information, and flexibility, as well as formal rights of appeal. Among the many factors that account for the difference, the most important seems to be that the relevant personnel in the Madison schools actually wanted parental participation; they thought it was necessary for the special education programs to work effectively. Given this goal, they were able to design the process of decision-making to encourage participation and to make it meaningful. For example, parents participated in the earliest stages of assessing the child's needs and planning a program, rather than being called in merely to consent to a diagnosis and plan already formulated (as was generally the case in the other systems). The teachers saw the parents' information and judgment about the child as valuable and thus treated them as actual partners in the decision-making. By contrast, in other systems studied, parents who raised questions were treated as "trouble makers."<sup>52</sup> Handler thinks that it is particularly important that in Madison conflict between the parents and the schools was not deflected, suppressed or avoided, but treated as part of a constructive process through which a better decision could be reached. The Madison schools also recognized that even with their positive attitude toward the parents and their acceptance of conflict, there was a power imbalance of resources and information that had to be addressed if the parents were to be able to take part effectively. "Parent advocates" were made available to try to redress the imbalance. In Massachusetts, by contrast, in the meetings at which the parents were presented with plans (made in their absence), the parents "were outnumbered, they were strangers confronting a group of people who had struck a bargain between them, and the discussion was often in technical jargon with the subtle implication that the child or the parent or both were at fault."<sup>53</sup> In Madison, information in clear, ordinary language was provided. The decision-making process was ongoing and open-ended, with room for readjustment. In most other school districts what

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also be able to participate in the decision, is thus not the problem Handler addresses. There is some question whether he adequately considers the *children's* autonomy in his analysis. See Minow, *Part of the Solution, Part of the Problem* (Book Review), 34 UCLA L. REV. 981 (1987).

51. Handler, *supra* note 49, Ch. 4. Handler notes that his is a case study based on interviews with the full range of system participants, conducted during the 1983 school year. The data, he says, are not systematic.

52. *Ibid.*, 66.

53. *Ibid.*, 67.

was supposed to be an ongoing process of consultation was usually collapsed into one or two meetings.

In short, "the conclusion of virtually all the research is that whereas P.L. 94-142 seems to have resulted in more parental *contact* with the school authorities, there has not been much change in parental *involvement* in the actual decision-making process."<sup>54</sup> Throughout the Madison approach, there is a recognition that the parents are in a continuing relationship with the school. The objective is not simply to arrive at a decision to which the parents will not object, but to sustain a relationship such that the necessary ongoing decisions can be collectively made in the best interests of the child (which in turn are recognized to involve relations with the parents and with the school and relations between the school and the parents).

The parents' own testimony is the most compelling evidence that the system in Madison was "working," that the parents were not subordinated objects of bureaucratic decision-making, but were partners in a relationship that fostered their dignity, efficacy, comprehension, and competence and that protected them from arbitrary power. The parents were dependent on the schools (although not as starkly as a welfare recipient is dependent on the welfare bureaucracy), but their relationship was nevertheless characterized by autonomy. The dependence was not removed, it was transformed. The autonomy was thus, of course, not based on independence, on the capacity to make decisions without being subject to anyone else's preferences, judgments, or choices (the sort of autonomy Reich associates with property<sup>55</sup>). It was autonomy within relationship. And for some parents, the autonomy fostered in the relationship with the school seems to have made them feel more generally competent and secure in their ability to understand and help make decisions about their child.<sup>56</sup>

There are also cautionary dimensions to the Madison story. First, Handler notes that Madison has a long history of active citizen participation which may have made possible both the inception and the success of this experiment. But while that means that one should not be overly sanguine about simply transporting the model elsewhere, it also suggests that patterns of social and political interaction can foster autonomous relationships. It further invites us to inquire into the details of the institutional and social practices that have fostered this participatory culture.

A little more troubling is the suggestion that participation actually dropped off once parents developed a high level of trust in the school. A successful relationship seemed to make parents feel that they need not work to sustain it. This is, of course, easily understandable. With all the

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54. *Ibid.*, 68.

55. Reich, *supra* note 47.

56. Handler, *supra* note 49, at 79.



competing pressures on one's time, why not delegate time-consuming decision-making to those one trusts? (And of course genuine participation is very time-consuming. Handler suggests that is one of the reasons most school districts comply with the legal requirements for parental participation in a perfunctory way.) In Madison, it was the school officials who complained about the parents' lack of participation.

Of course it is an old problem that genuine power-sharing and democracy are time-consuming. One would need to know more about the Madison story to tell whether the parents' stepping back from active involvement necessarily undermined the autonomy fostered by the original relationship. It may be that the Madison parents were exercising their autonomy to make a reasonable choice of delegation—a choice that has nothing in common with forced acquiescence in the presumed superior authority of school officials. Perhaps it is enough if the parents continue to feel able to understand and evaluate what is happening with their child, and able to become involved whenever it seems necessary to them. Their sense of a *capacity* to participate may be what is crucial, rather than participation itself. Unfortunately, it may also be that while the parents' autonomy remains intact, the child's education suffers when participation drops off.

There are other problems (e.g., the question of whether the "parent advocates" are actually used and what their role should be) and quibbles (Handler's language of negotiation and bargaining does not capture my image of an optimal relationship, and even the parental statements he likes best have hints that the primary decision-makers are the school professionals).<sup>57</sup> But overall, Handler's argument shows both that the participatory move in American law can foster autonomy and that legal requirements alone are insufficient.

### C. *Conceptual Failures of Liberal Rights*<sup>58</sup>

These developments in administrative law grew out of the best in the American liberal tradition: its emphasis on the protection of individuals from the power of the state. But the tradition has also been the source of problems with the judicial response to conflicts between individuals and the bureaucracies upon which they are dependent. It is hardly surprising that a tradition which has conceived of the relationship between the individual and the collective primarily in terms of the threat of the latter does not provide an adequate basis for defining individual rights in the context

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57. The quote he uses to open the chapter on Madison reads: "Our family has never been criticized, they've never said, 'you're failing him.' They've encouraged us to allow him to do more and try more, and not to be afraid. They've convinced us he can do more than we think he can do." Ibid. One can see that the relationship has been helpful, supportive, and respectful, but to me it does not quite convey the sense of fully equal partnership.

58. Handler also treats the failures of due process as a conceptual failure.

of affirmative responsibilities of the state. The dichotomy between individual rights and state power has meant that the courts have particular trouble in cases which require them both to accept the state's intrusion into previously private spheres *and* to develop a useful framework of individual rights.

*Wyman v. James*<sup>59</sup> dramatically illustrates the justices' inability to analyze rights in the context of dependence. The Supreme Court held that a social worker did not need a warrant for a "home visit" to a woman receiving Aid for Families with Dependent Children. Justice Blackmun's underlying argument for the majority was essentially this: in accepting the state's offer of responsibility for the welfare of her child, Mrs. James had declared her home life to be the state's business. She could not then turn around and stand on the traditional rights of individuals against state intrusion. In dissent, Justice Douglas made an impassioned argument against the state's capacity to "buy up" rights when it distributes largesse and convincingly argued that if Mrs. James were a businessman objecting to administrative searches, she would win. But Douglas showed virtually no acknowledgement of the ways in which traditional rights may have to be reconceived as the state takes on responsibilities that transform its relations to the individual. Neither approach seems to recognize that the task is to think creatively about the protections of autonomy given the realities of overlapping spheres of public and private interest. Neither a denial of rights nor a denial of realities can solve the problem.

Even when courts do try to protect individual rights in the face of collective power, they tend to use a private-rights model to define and justify the rights in question. Thus *Goldberg v. Kelly* uses the concept of "new property" to explain why welfare recipients are entitled to pre-termination hearings. The choice of property is understandable, but particularly unfortunate. As subsequent developments<sup>60</sup> have shown, characterizing dependents' rights as property invites a focus on entitlement that misses the point and facilitates retrenchment. Property also carries with it a powerful tradition of inequality which should not be incorporated into new conceptions of autonomy.

But the problem with the concept of new property is more general. It is a mistake to tie protections for citizens' autonomy to particular substantive rights. The objective is to protect the autonomy of citizens in their interactions with government. The appropriate forms of those interactions may vary depending on the kind of interest involved. But the entitlement to autonomy, and to bureaucratic encounters conducive to autonomy, should

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59. 400 U.S. 309 (1971).

60. These developments began with *Board of Regents v. Roth*, 408 U.S. 564 (1972), in which the Court held that a one-year position at a state university did not constitute a property interest and did not, therefore, bring with it an entitlement to due process.

not depend upon or be deduced from the particular interest at stake.<sup>61</sup> What is at issue here is autonomy and democratic citizenship, which are not relevant only to particular rights.

And for reasons suggested in my discussion of *Wyman v. James*, the use of a private-rights model may only lead to the abandonment of any judicial protection. Jerry Mashaw's similar argument about private law and public law models suggests that the evident inappropriateness of private law models for state undertakings such as welfare may lead courts to cede complete authority to legislatures to define the terms on which benefits are granted or withdrawn.<sup>62</sup>

## V. DEMOCRACY AND AUTONOMY

The possibility of such abandonment points to another, quite different error or danger of contemporary administrative law: the tendency to treat autonomy exclusively as a matter of process rather than as a substantive value. The danger arises because so many of the protections for autonomy rest on forms of participation. These forms are indeed the strength of the legal response, but the focus on process may easily be confused with a powerful trend in contemporary legal theory: the effort to build a constitutional theory based on the values of democracy and consent alone.

This seems to me a fundamental error—a misunderstanding not only of our constitutional system, but of the kind of political system which can foster the good society, and autonomy in particular. Property was once the core of a tension between democratic values of popular rule and liberal values of individual rights as limits on state power. Property neither can nor should continue to serve this role. But we should not abandon the tension itself. It has been the strength of our system and captures the irreducible tension between the individual and the collective which any good society must recognize and find ways of dealing with. Autonomy should be contrasted with democratic values in the following related senses: democracy is not itself sufficient to ensure autonomy; autonomy is a substantive value which can be threatened by democratic outcomes, even though the democratic process is itself a necessary component of autonomy; and the outcomes of democratic processes should respect the autonomy of all citizens and should be held accountable for doing so.

The confusion and correspondence between democracy and autonomy do not, of course, rest with prevailing legal theories alone; the correspondence between the two is real. Participation seems central to both. Its importance to democracy is obvious. It has been my basic point here that

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61. In constitutional terms, which I have so far avoided, one might argue that there is a "liberty interest" in autonomy itself, rather than that individuals are entitled to be treated in a manner compatible with autonomy only when they can demonstrate a property or liberty interest.

62. Mashaw, "Rights" in the *Federal Administrative State*, 92 YALE L.J. 1129 (1983).

citizens who participate directly<sup>63</sup> in the decisions affecting them are less likely to relinquish their autonomy as they accept the benefits or control of the state. But participation here is a means to autonomy, not its substantive content. The fact that the means of protecting autonomy may primarily be forms of participation should not lead to the confusion that autonomy can be subsumed under democracy. We should not collapse democracy and autonomy into a single value, despite their close connection.

The perfection of democracy thus cannot alone assure protection of autonomy. To believe that it can is to believe that a democratically organized collective would never do violence to the autonomy of any of its members. That seems to me implausible. What is required is an understanding of the substance of autonomy and of the practices that foster it so that citizens can ask whether the actions or institutions proposed in their collective decision-making are consistent with the autonomy of all. We must, for example, ask whether official action in any particular circumstance denies clients basic respect or treats them in ways that makes them less able to understand what is happening to them, less able to participate effectively in the decisions affecting their lives, less able to define and pursue their own goals—in short, in ways that undermine rather than foster their capacity to find and live by their own law.

It may be that if such failings are found, increased participation will be a partial remedy. Or the client may need information or support. Or the outlook of the official (e.g., seeing parents as time-consuming sources of trouble rather than as participants valued for their information and judgment) may be the source of the problem. Or it may be that the interaction, such as intrusive home visits, is inherently incompatible with the autonomy of the client and can only be justified under exceptional circumstances (e.g., the sort of probable cause needed for a warrant). And impedes such as that over home visits may be evidence that the whole relationship between client and authority must be restructured if it is to foster the client's autonomy.

Further, some mechanism would probably be needed to encourage and facilitate the posing of questions about institutional compatibility with autonomy. In other words, there must be means of measuring the content of collective decisions against the (separate and substantive) value of autonomy. Such means would include appropriate institutions, language, and habits of inquiry through which citizens and representatives of some kind (including judges) could check whether the laws, rules, or patterns of official behavior fostered or undermined autonomy. Such an inquiry is only

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63. As noted earlier, I do not think that the more general form of participation in elections of democratic bodies can substitute for direct participation in administrative decision-making.

possible if we have a concept of autonomy that is distinct from the democratic processes which may threaten it.

It is important to distinguish the above (somewhat vague and awkwardly stated) ideas from the conventional liberal understanding of individual rights, and of autonomy in particular. First, the wordy awkwardness arises from a deliberate effort to avoid the neat and pithy claim that autonomy should be a substantive limit to democratic outcomes. That powerful vision of rights-as-limits no longer seems to me the best way of thinking about or trying to institutionalize the notion that in any society there will be competing values and that groups of people exercising democratic power may be inclined to override even basic values. What seems important is the clear articulation of the values a society considers basic (surely an ongoing process), together with the idea that democratic outcomes are not (at least in the first instance) dispositive of the meaning of those values or what counts as a violation of them. But that is a long way from saying that rights are trumps. A society should, as I argued above, acknowledge the inherent tension between the collective and the individual and find means of mediating as well as sustaining the tension. I say "sustaining" because the values of neither the individual nor the collective should be collapsed into the other. Treating rights as limits on democracy is one way of maintaining both distinct values; but it is a method that throws its weight too heavily to the side of the individual.<sup>64</sup>

There is a second distinction that is best put as an answer to the following challenge: You started by saying that you were going to break down the conventional dichotomies, but aren't we right back in the conventional choices and conflicts between collective goods and individual rights? Aren't you just restating the old liberal argument that, of course, rights (including autonomy) sometimes have to be balanced against the public good—only without the willingness to guarantee rights against collective oppression? How is this a new conception of autonomy?<sup>65</sup> The answer is that in measuring and weighing collective choices against the value of autonomy, the meaning of autonomy will be different. The autonomy I am talking about does remain an individual value, a value that takes its meaning from the recognition of (and respect for) the inherent individuality of each person. But it takes its meaning no less from the recognition that individuality cannot be conceived of in isolation from the social con-

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64. The Canadian Charter of Rights and Freedoms designates rights as basic values, but it does not treat them as absolute limits. The very first section of the Charter says that it "guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." CAN. CHARTER OF RIGHTS AND FREEDOMS § 1. There is also an "override" provision that permits legislatures to pass a law notwithstanding its violation of the Charter. *Id.* at § 33(1). The "notwithstanding" clause must be part of the bill and any law so passed ceases to have effect after five years (and thus would have to be passed again). *Id.* at § 33(3). Canada is likely, therefore, to generate a jurisprudence and a set of institutional practices that put into effect some version of the notion of rights that I have articulated.

65. My thanks to my colleague Alan Brudner for posing this challenge.

text in which that individuality comes into being. The value of autonomy will at some level be inseparable from the relations that make it possible; there will thus be a social component built into the meaning of autonomy. That is the difference. But the presence of a social component does not mean that the value cannot be threatened by collective choices; hence the continuing need to identify autonomy as a separate value, to take account of its vulnerability to democratic decision-making, and to find some way of making those decisions "accountable" to the value of autonomy.

## VI. CONCLUSION

This inquiry has been prompted more by an interest in future possibilities than by hopes for the perfection of autonomy under the current American legal system. Forms of bureaucratic decision-making—however participatory or otherwise optimal—cannot change basic power relations and structures of inequality. These more than anything determine the potential for autonomy for all citizens, for subordination and powerlessness are incompatible with autonomy. But even in a quite imperfect society, experiments with forms of collective (bureaucratic) power and with the relations between those implementing it and those dependent upon it can give us insight into what optimal forms and relations would look like. What I have tried to do is suggest a framework which we can use to help extract what is useful out of current experiments—since I believe that a new conception of autonomy is not likely to spring full-blown from theory.

I see the development of such a conception as essential for working out alternatives to our present system. The alternatives which seem compelling to me all involve a far greater role for collective power and responsibility than does our current system. Those who aspire to such alternatives must be able to persuade themselves as well as their critics that such changes need not diminish, though they will certainly change, autonomy. More importantly, we must have language that adequately captures our highest goals, in terms that reflect both the individual and the social dimensions of human beings. That language will take some time to emerge, but in the meantime we cannot cede to liberal convention a monopoly on the value of autonomy.